Insurer's Interim Order of Pre-Hearing Security Against a Policyholder Confirmed by Court in a Barger & Wolen Victory

October 26, 2011 by Evan L. Smoak and Kyle M. Medley

In a Barger & Wolen victory, the U.S. District Court in Manhattan has confirmed an arbitration panel's interim order, which required a policyholder to post pre-hearing security in the amount sought by an insurer. *On Time Staffing, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA,* No. 10 Civ. 9583 (JSR), 2011 U.S. Dist. LEXIS 50683 (S.D.N.Y. May 11, 2011).

In *On Time,* the arbitration panel issued an interim order of pre-hearing security in favor of National Union against one of its policyholders, On Time. National Union had argued that the policyholder was financially unable or simply unwilling to pay on the amount National Union sought in the arbitration for premiums, fees, and expenses.

The policyholder asked the court to vacate the order of pre-hearing security on two grounds. First, the policyholder argued that the panel had exceeded its authority by awarding pre-hearing security (under Section 10(a)(4) of the Federal Arbitration Act "FAA"). Second, the policyholder argued that the Panel's order of pre-hearing security before a full evidentiary hearing constituted "misconduct" by the Panel (under Section 10(a)(3) of the FAA). Judge Jed S. Rakoff rejected both of the policyholder's arguments.

First, the court found that the arbitration panel had not exceeded its authority, noting that the language of the arbitration clause gave the Panel broad authority to resolve "any" dispute and to make its award "final and binding". The court stated:

"Prior to the rendering of its final decision, the Panel, in the absence of language expressly to the contrary, possesses the inherent authority to preserve the integrity of the arbitration process to which the parties have agreed by, if warranted, requiring the posting of security. Otherwise, an arbitration panel with a well-founded concern that a party was financially unable to satisfy an eventual award would have no recourse to protect itself against the risk that its significant expenditures of time and effort would be for naught."

On Time, 2011 U.S. Dist. LEXIS 50683 at *12 (underline added).

Second, the court rejected the policyholder's argument that the Panel had committed misconduct when it ordered security without a full evidentiary hearing. The court found that the arbitrators "need not follow all of the niceties observed by the federal courts", but instead had to "merely grant a fundamentally fair hearing". *Id.* at *13. In any event, the court found the policyholder had "an ample opportunity to oppose the motion for pre-hearing security, and did, in fact, vigorously oppose it". *Id.* at *14.

This is a significant victory, as the decision confirms a pre-hearing security order against a policyholder and in favor of an insurer.

For additional information about this decision, or the arguments considered by the court, please contact Evan Smoak (esmoak@bargerwolen.com) or Kyle Medley (kmedley@bargerwolen.com) in Barger & Wolen's New York office (212-557-2800).